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Subject: TRADEMARK APPLICATION NO. 78576416 - DURA GUARD - 8209.672
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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/576416

APPLICANT: Rally Manufacturing, Inc.

CORRESPONDENT ADDRESS:

MATTHEW F. JOHNSTON
LINIAK BERENATO & WHITE
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BETHESDA, MD 20817-1173

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CORRESPONDENT'S REFERENCE/DOCKET NO: 8209.672

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mjohnston@lblw.com

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address..

Serial Number 78/576416

The trademark examining attorney has carefully reviewed the request for reconsideration submitted on December 13, 2006 and is not persuaded by applicant's arguments. No new compelling evidence has been presented with regard to the point(s) at issue in the final action. TMEP §715.03(a).

The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b).

The applicant's mark, "DURA GUARD", is similar to the registered mark, "DURAGARD", because they are phonetic equivalents. The only differences in the marks are the existence of a space between "DURA" and the word "GUARD" and the letter "U" in applicant's mark versus the unitary "DURAGARD" spelled without a "U" in the registered mark. These differences do not alter the commercial impression of the marks.

Applicant has attached copies of registrations using variants of applicant's mark, "Dura Guard". Third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion. *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Third-party registrations are not evidence of what happens in the marketplace or that the public is familiar with the use of those marks. *In re Comexa Ltda*, 60 USPQ2d 1118 (TTAB 2001); *National Aeronautics and Space Admin. v. Record Chem. Co.*, 185 USPQ 563 (TTAB 1975); TMEP §1207.01(d)(iii). Further, existence on the register of other confusingly similar marks would not assist applicant in registering yet another mark which so resembles the cited registered mark that confusion is likely. *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999).

Applicant contends that there is widespread use of variations of applicant's mark "throughout the automotive industry and within the same class of many goods and service. Applicant's goods, namely, "floor mats for land vehicles" are designated within international class 027. This is the class for "floor coverings". The only mark in class 027 is "Duraguard" for "vinyl floor covering". The only commonality between these goods is that they are floor coverings but their industries are unrelated. Therefore, the mark is not weak in the context of class 027 as applicant's attorney suggests.

Furthermore, in class 012, the class for "vehicles" and the majority of goods related to land vehicles are the registrant's goods, "semi fitted and fitted seat covers for vehicles" and another registration for "oil filters for automotive engines". Prior decisions and actions of other trademark examining attorneys in registering different marks are without evidentiary value and are not binding upon the Office. Each case is decided on its own facts, and each mark stands on its own merits. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984); *In re Consolidated Foods Corp.*, 200 USPQ 477

(TTAB 1978).

Both the applicant and registrant have goods, which are considered "car accessories". The marks suggest that the goods are durable and help to guard a car against damage. Therefore, it is highly likely that a consumer buying a "car cover" would see "floor mats" under a highly similar mark and think the goods are from the same source since the differences between the marks are so subtle. The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source of those goods. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993), and cases cited therein.

The Trademark Trial and Appeal Board has generally held that marketing by different parties of different types of automotive parts and accessories under the same or similar marks is likely to cause confusion. See *In re Jeep Corporation*, 222 USPQ 333, 334 (TTAB 1984) (citing *Monarch Mufflers, Inc., v. Goerlick's, Inc.*, 148 USPQ 20 (TTAB 1965) (MONARCH for brake linings for automotive use likely to cause confusion with MONARCH for exhaust mufflers for motor vehicles); *AP Parts Corp. v. Automotive Products Associated*, 156 USPQ 254 (TTAB 1967) (AP for clutches, brakes, steering joints, tie-rod joints, and suspension joints for land vehicles, aircraft or watercraft likely to cause confusion with AP for mufflers for explosive engines); *Sieberling Rubber Co. v. General Battery and Ceramic Corp.*, 167 USPQ 766 (TTAB 1964) (HOLIDAY for storage batteries likely to cause confusion with HOLIDAY for pneumatic rubber tires and automobile floor mats); *In re Market Tire Co. of Maryland, Inc.*, 171 USPQ 636 (TTAB 1971) (ADMIRAL for vehicle tires likely to cause confusion with ADMIRAL for radiator antifreeze); *In re Uniroyal, Inc.*, 177 USPQ 29 (TTAB 1973) (KODIAK for vehicle tires likely to cause confusion with KODIAK and design for antifreeze and KODIAK for automobile heaters); *In re Magic Muffler Service, Inc.*, 184 USPQ 125 (TTAB 1984) (MAGIC for vehicle parts, namely mufflers likely to cause confusion with MAGIC for motors for motor vehicles); *In re Trelleborgs Gummifabriks Aktiebolag*, 189 USPQ 106 (TTAB 1975) (T and design for, inter alia, hoses, namely rubber hoses and inner tubes for tires and pneumatic, semisolid and solid tires likely to cause confusion with T and design for, inter alia, motor oil, oil additives and fuel additives); *In re Red Diamond Battery Co.*, 203 USPQ 472 (TTAB 1979) (RED DIAMOND for storage batteries likely to cause confusion with DIAMOND for pneumatic rubber automobile and vehicle tires); *In re Delbar Products, Inc.*, 217 USPQ 859 (TTAB 1981) (ULTRA for outside mounted vehicle mirrors likely to cause confusion with ULTRA and design for automobile parts, namely pistons and pins, valves, water pumps, oil pumps, universal joints, gears, axle shafts, hydraulic brake parts, automatic transmission repair kits and parts, engine bearings and jacks).

Examining attorney agrees with attorney for applicant that the prior evidence submitted did not include "car covers for vehicles" and instead included evidence showing "seat covers for vehicles". The trademark examining attorney refers to the excerpted information from the Google® search engine in which "car covers" and "floor mats" are shown available from the same trade channels, retail sources and manufacturers. See attachments.

Included in this evidence is an excerpt from applicant's website, www.rallymfg.com, which advertises both car covers and floor mats. Printouts from applicant's website can be used as evidence to support a refusal, regardless of the filing basis of the application. The mere fact that an applicant may have filed an intent-to-use application or an application based on a foreign or international registration "does not limit the Office's evidentiary options, nor does it shield an applicant from producing evidence it may have in its possession." See *In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006).

The request for reconsideration is **denied** and the final refusal(s) and requirement(s) are continued. 37 C.F.R. §2.64(b); TMEP §715.04. The filing of a request for reconsideration does *not* extend the time for filing a proper response to the final action, which runs from the date the final action was mailed. 37

C.F.R. §2.64(b); TMEP §§715.03 and 715.03(c).

/Julie M. Guttadauro/
Trademark Examining Attorney
Law Office 106
(571) 272-5875
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2. pepboys-2
3. autoanythi-1
4. autoanythi-2
5. autoanythi-3
6. autoanythi-4
7. autoanythi-5
8. autoanythi-6
9. racepages-1
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11. racepages-3
12. racepages-4

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ANTENNAS | CAR COVERS | FLOOR MATS | HYDRAULICS | LIGHTING | LUG NUTS | MIRRORS | WHEEL COVER | WIPERS | 12 VOLT

COMPANY PROFILE

Founded in 1980 and headquartered in Miami Florida, Rally Manufacturing, Inc. is one of the leading automotive accessory manufacturers, worldwide. Rally products are in more than 14,000 retail stores across the U.S., Canada, Mexico and Europe including Advance Auto Parts, AutoZone, Pep Boys, Napa Auto Parts, Wal-Mart, K-mart, and Target Stores.

Rally's product line includes Wheel Covers, Car Covers, Auxiliary Lights, Hydraulic Lift and Service Products, Floor Mats, Lug Nuts & Locks, Car & Truck Mirrors, Wiper Blades & Refills, Antennas as well as 12 Volt accessories. Rally has one of the most complete and innovative product offerings in every category it produces.

Rally products are created by our in-house engineering and design team to meet the latest



style and performance demands in the industry. Choices are almost limitless, due to the large selection of products, styles and finishes.

Rally operates offices globally in North America, Europe, and Asia. A state of the art 250,000 square foot distribution facility for the Americas is located in Miami FL, equipped with 24 hour order turnaround through our EDI ordering systems.

Our focus is on Quality and Design. Each and every one of our products goes through a multi-stage quality assurance process in order to deliver top performance. Our designs incorporate the most innovative technology available. Rally has amassed more than 500 U.S. patents for design and functionality. Further evidence that proof of performance is in our products.



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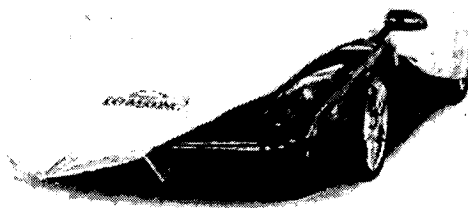
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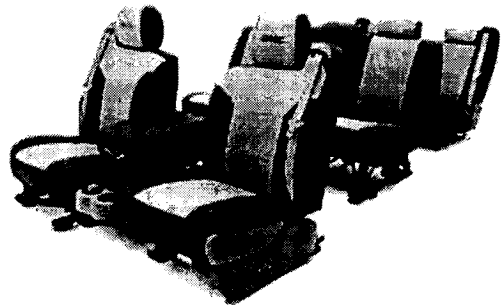


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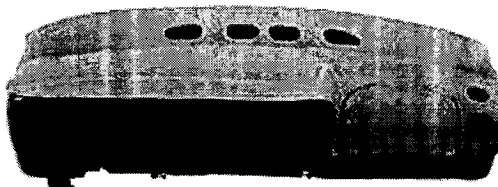
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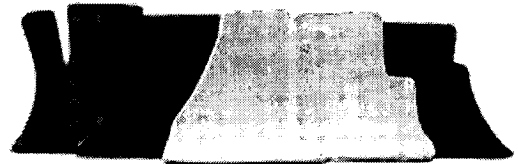
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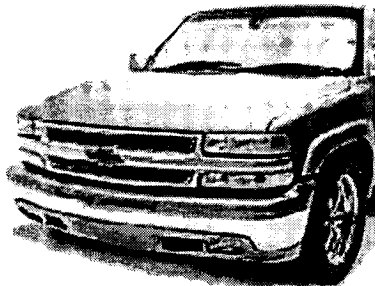
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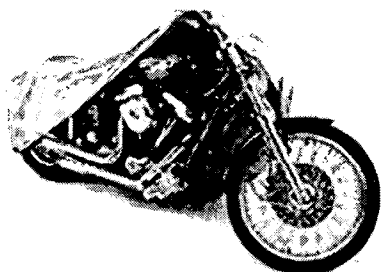
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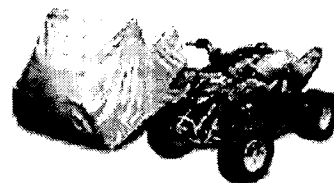
MOTORCYCLE AND ATV COVERS



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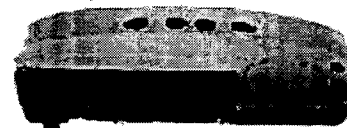
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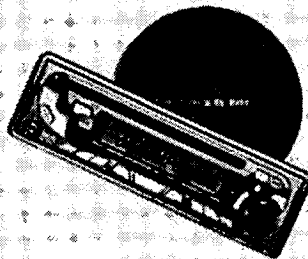
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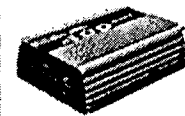
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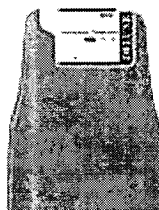


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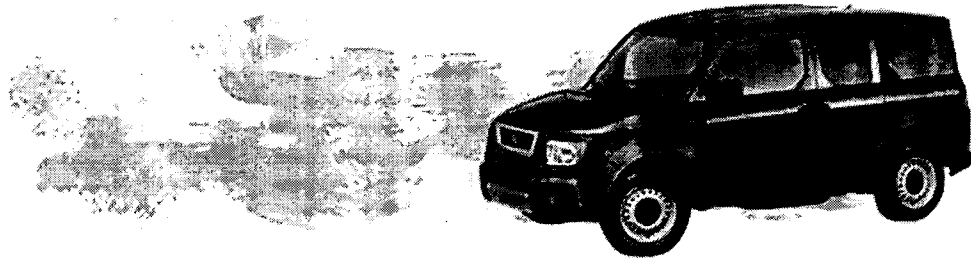
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At AutoAnything, we make returns easy!

We guarantee satisfaction with all of the auto accessories we sell, and do our best to ensure you getting products you'll love.

If for any reason you are not completely satisfied with your purchase, you may return the item within 30 days of delivery of your order - no hassles. The item(s) must be in a new condition, including original packaging, parts and paperwork.

Orders returned in a new, ready-to-sell condition will receive a full and prompt refund, excluding shipping costs.


****AutoAnything does not accept returns of used items. returns of products noted in the description**



- > Air Intake Systems
- > Brakes & Brake Pads
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[See Details](#)  **SUBMIT** 

****AutoAnything does not accept returns of used items, returns of products noted in the description as non-returnable (such as custom paint-matched products), or items returned more than 30 days after delivery**

****International orders may only be exchanged if the item is defective. No other returns/exchanges will be accepted**

Return procedure

If you've decided to return an item to us, you'll need a Return Authorization Number (RA#). All returns require an RA# in order for us to accept shipment of your item(s).

To get this number, just login to the Order Status Page with your email address and password/order number. Select the "Return Items" link above the products in your order, and choose a reason for return from the dropdown menu at right. Click "Submit" below, and a return request will be sent to our returns department.

We'll call or email you within 1-2 business days with an RA# for your order. The Customer Service Representative contacting you will have further instructions for your easy return. Currently, AutoAnything does not automatically generate RA#s online.

Shipments without a valid RA# clearly posted on the outside of the box will incur a 15% restocking fee. AutoAnything is not responsible for items returned without traceable markings (customer's name, address and RA#) on or in the box.

➤ [Log-in to your account here](#)

Defective items

If an item arrives in a not-new condition as a result of manufacturer defect, or a defect occurs during the intended use of the product, we will send you a pre-paid UPS shipping label to use for returning your order to AutoAnything.

To get this shipping label and a valid RA#, see our full return procedure above. Once you've got the label and the RA#, just ship the defective item with the original packaging, paperwork and parts back to us. We'll process your return and ship you a replacement or credit your account promptly.

****AutoAnything does not reimburse for labor charges or installation time under any circumstance**

Restocking Fees

AutoAnything does not charge a restocking fee for returning most items in our store. However, the following fees do apply to the following custom items, which are made-to-order at the factory for your specific vehicle:

- Lloyd Mats products, including Lloyd, RubberTite, and Invisible Floor Mats
- Colgan Custom Car Bras
- LeBra Car Bras
- CoverKing and AutoAnything Car Covers, including MultiGuard, Stormproof, UltraGuard, UltraStretch, and Satin Stretch
- All Dash Kits

These items are subject to a 15% restocking fee if they are returned without defect or the reason for return is not listed above.

These items are subject to a 15% restocking fee if they are returned without defect, or the reason for return is not the fault of AutoAnything. In the case of defect or our error, no restocking fee is charged. The vast majority of our customers are extremely happy with our specially-tailored items for the vehicle, and never need to return them.

A 15% restocking fee also applies to the following returns:

• **Orders returned without a proper Return Authorization Number**

Items returned without receiving a proper Return Authorization Number (RA#), or returns received without an RA# clearly posted on the outside of the return box will be charged for restocking.

• [More information on getting an RA#](#)

• **Orders placed for the incorrect model year of your vehicle**

Because manufacturers are constantly changing vehicle designs, we do not guarantee an older item will fit a newer vehicle, and vice versa. Ordering a product not specifically designed for your vehicle (for example, a 2005 model year car cover ordered for a 2006 vehicle) is done at your own risk and will incur a restocking fee if returned.

Credits

All returned item(s) will be examined upon arrival at our warehouse. In order to receive full credit for your return (not including shipping costs), the item(s) must meet the following criteria:

• **The item(s) must be returned in new condition**

All items returned for refund or exchange to AutoAnything must be in a new, ready-to-sell condition. This includes all installation hardware, instructions, packaging and paperwork that is part of your original order.

• **The return package must be clearly labeled with a proper Return Authorization Number (RA#)**

Items returned without obtaining an RA# first or without clearly displaying the number are subject to a 15% restocking fee. For more information about obtaining an RA#, [click here](#).

After we accept your return, the credit card originally used to place your order will be credited for the purchase price of the item and any applicable sales tax, excluding all shipping costs.

You will be sent an email confirming receipt of your return and your credit. Please allow an additional 5-7 days for the credit to appear on your account.

****If a product is not in new condition (including original packaging and paperwork) or does not meet the return conditions, we may be unable to issue you a credit or exchange for a replacement, and the item may be shipped back to you.**

Exchanges/Replacements

Because of the custom nature of our products and AutoAnything's unique relationship with our manufacturing partners, we do not process exchanges in the traditional manner, that is, a returned product is not directly exchanged for another product in our inventory. Instead, we credit your card for the initial order (the returned item), and charge your card for a new order (the replacement item).

Items to be replaced must meet the same conditions as items returned to AutoAnything for refund. Non-defective items returned for exchange must be in a new, ready-to-sell condition with all original packaging, paperwork and parts included. Defective items must also be returned with the same parts included in the original order.

If you request that an item be replaced, we will ship your new item after we receive and process returned product. Please allow 5-10 business days to process your return once it has arrived at our warehouse.

If you need the alternate item right away, we suggest placing a new order for the replacement product via our online shopping cart, or email us at sales@autoanything.com for expedited ordering. Expedited shipping charges may apply for rush orders.

Items to be replaced and sent to us without a proper Return Authorization Number (RA#) are subject to a 15% restocking fee. Login to your Order Status Page to begin the return process and receive your RA#.

➤ Full return procedure

The same restocking fee policy that applies to returns also covers replacement orders. View our restocking fees policy [here](#).

Non-returnable Products

Most of the items available at AutoAnything may be returned for full or partial credit. However, the following custom items, which are made-to-order at the factory for your specific vehicle, are not returnable:

- Covercraft Custom-Fit Car Covers:
 - Any Cover Manufactured For a Pre-1970 Model Year Vehicle
 - "Ultralon"
 - "WeatherShield HD"
 - "Non-Standard WeatherShield Colors"
 - "Form-Fit Fabrics"
 - "Sunbrella Fabrics"
- Sheepskin Experts Seat Covers
 - "Custom Cotton Canvas Seat Covers"
- Blue Ribbon Sheepskin / Superlambs
 - "5-Star Sheepskin Seat Covers"
 - "5 Star Plus Sheepskin Seat Covers"
- Lloyd Mats
 - "Premium Plush" Mats

In the case of defect or our error, these items may be returned for full or partial credit, depending on the circumstances. The vast majority of our customers are extremely happy with our specially-tailored items for their vehicle, and never need to return them.

Holiday Returns

During the holiday season, AutoAnything makes it easier than ever for you or your gift recipient:

return items.

On orders placed between November 1, 2005 and January 1, 2006, you'll have up to 60 days from time of delivery to return any item-double the standard 30-day policy.

As with any of our returns, items must be in an unused, new condition and include original package and paperwork in order to receive a refund. All other standard return policies/procedures apply.

RETURNS FAQ

- › How do I return an item?
- › Can I get a Return Authorization Number (RA#) online?
- › Can I exchange an item?
- › Will I have to pay a restocking fee?
- › Who pays for return shipping costs?
- › I received the wrong item for my vehicle. What do I do now?

How do I return an item?

If you've decided to return an item to us, you'll need a Return Authorization Number (RA#). All returns require an RA# in order for us to accept shipment of your item(s).

To get this number, just login to the Order Status Page with your email address and password/order number. Select the "Return Items" link above the products in your order, and choose a reason for return from the dropdown menu at right. Click "Submit" below, and a return request will be sent to our returns department.

We'll call or email you within 1-2 business days with an RA# for your order. The Customer Service Representative contacting you will have further instructions for your easy return. Currently, AutoAnything does not automatically generate RA#s online.

Shipments without a valid RA# clearly posted on the outside of the box will incur a 15% restocking fee. AutoAnything is not responsible for items returned without traceable markings (customer's name, address and RA#) on or in the box.

Can I get a Return Authorization Number (RA#) online?

Currently, AutoAnything cannot issue an RA# for your order completely online. You can request an RA# through your Order Status Page. We'll contact you with the RA# for your order by telephone or email within 1-2 business days.

Can I exchange an item?

Items in new condition (including original packaging, paperwork, hardware and instructions) may be returned for exchange. Just use the same return procedure used for returns to AutoAnything. See our full exchange policy here.

Will I have to pay a restocking fee?

AutoAnything does not charge a restocking fee for returning most items in our store. However, restocking fees do apply to the following factory made-to-order items and return cases:

- ⊕ Sheepskin Experts Cotton Canvas Seat Covers
- ⊕ Lloyd Mats products, including Lloyd, RubberTite, Invisible and Premium Plush Floor Mats
- ⊕ Colgan Custom Car Bras
- ⊕ LeBra Car Bras
- ⊕ Orders returned without a proper Return Authorization Number (RA#)
- ⊕ Orders placed for the incorrect model year of your vehicle

See our full policy on restocking fees here.

Who pays for return shipping costs?

AutoAnything covers return shipping costs if the return is due to a manufacturing defect or as a result of our error. We will provide you with a pre-paid UPS label to return the product(s) to us in this situation.

Items returned for reasons other than defect or AutoAnything error will not be provided with a pre-paid UPS return label. These returns include reasons such as "changed my mind," "did not like the product" and "ordered the incorrect product".

I received the wrong item for my vehicle. What do I do now?

First, verify that the part number you ordered and the part number you received are the same. You can check this number from the receipt in your shipment against the part number on your original order receipt or in your Order Status Page.

If the part numbers match, you may have ordered the incorrect part number for your vehicle. Please login to your Order Status Page and begin our return procedure. We'll process your return and exchange the item for the correct part (if available).

If the numbers do not match, you may have been erroneously shipped the wrong part for your vehicle. While this is an extremely rare case, it can happen with the volume of orders we ship from our manufacturers and fulfillment centers. Login to your Order Status Page and begin our return procedure. A prepaid UPS shipping label will be sent for returning the incorrect item, assuming you received the incorrect part through our error.

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AutoAnything 9210 Sky Park Court, San Diego California 92123 800-874-8888 or 858-569-8111
Phone Sales Hours: (PST) Mon - Thu 5:00am - 6:00pm; Fri 5:00am - 5:00pm; Sat - Sun 6:00am - 3:30pm
Customer Service Hours: (PST) Mon - Fri 6:00am-5:00pm

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